In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1257

JOHN ALBERT COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 281-282) is reported at 356 F. 2d 918.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 1966 (R. 283). A petition for rehearing was denied on March 30, 1966 (R. 285-287, 292). The petition for a writ of certiorari was filed

on April 27, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the judge properly charged the jury on the elements of the offenses.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of Texas, petitioner was convicted of unlawful possession of a stolen United States Treasurer's check knowing it to have been stolen, in violation of 18 U.S.C. 1708 (Count 1); forgery of the check in violation of 18 U.S.C. 495 (Count 2); and uttering the forged check in violation of 18 U.S.C. 495 (Count 3) (R. 3-5, 259-260, 274). Concurrent two-year sentences of imprisonment were imposed on each of the three counts (R. 275). The conviction was unanimously affirmed (R. 283).

1. The evidence showed that Mr. Newsome failed to receive his regular monthly railroad retirement check for February, 1964 (Gov. Ex. 1; R. 34). On February 2, 1964, Newsome heard his mailbox being opened. When he stepped on the porch, he saw petitioner reach behind his hip pocket while asking for a charitable contribution (R. 40-41). Shortly thereafter petitioner cashed the check at Mrs. Conner's liquor store (R. 70-71). Upon becoming suspicious that petitioner was too young for railroad retirement, Mrs. Conner followed him. Petitioner ran away when he became aware that he was being followed (R. 72-73). Mrs. Conner telephoned Newsome

about the check after looking up his number in the telephone book, and Newsome reported to the Postal Department that his mailbox had been robbed (R. 73-74, 46). A postal inspector recovered the check at the liquor store and was given a description of the suspect by Mrs. Conner and Newsome (R. 98-99, 74, 114), both of whom subsequently identified petitioner (R. 74-75, 109). Petitioner furnished specimens of his handwriting which, according to testimony of a handwriting expert, corresponded with the endorsement on the stolen check (R. 99-102, 137-138).

Petitioner testified and denied having been on Newsome's porch soliciting a contribution and having forged or cashed the check (R. 172, 162).

2. Prior to the final charge, petitioner's counsel told the court that he had no requests for special instructions and that he would be satisfied with a general charge (R. 233). In its charge, the court first defined the terms "unlawful," "wilfully," "knowingly," "forgery" and "intent to defraud," as used in the indictment (R. 243-245). After paraphrasing Count 1 of the indictment, the court briefly discussed the evidence and then read in full 18 U.S.C. 1708, upon which Count 1 was based (R. 245-248). The court similarly summarized Counts 2 and 3 and read verbatim the provisions of 18 U.S.C. 495 as applicable to those counts (R. 248-250). Finally, the court gave a charge on expert testimony (R. 252). Petitioner's counsel stated he had no objections to the charge as given (R. 254).

After some deliberation, the jury submitted a question as to whether Count 1 charged that petitioner

took the check from the mailbox or only that he had it in his possession (R. 256, 273). The court explained that the count charged petitioner with having possession of the check, knowing it to have been stolen. He told the jury that if they should find he did have possession, "then your next inquiry is whether he had knowledge it was stolen" (R. 256). He again briefly reviewed the evidence and indicated that the significant question was knowledge (R. 257).

ARGUMENT

The judge adequately presented the issues in this simple case to the jury. As to the forgery counts, the case turned on whether the jury believed the testimony of Mrs. Conner and the expert that petitioner was the one who signed Mr. Newsome's name and cashed the check, or whether it believed petitioner's testimony that he did not. The judge so informed the jury (R. 242, 245, 251). The judge also separately defined for the jury the various terms used in the indictment, including forgery and intent to defraud (R. 243-245). In these circumstances, the reading of the full language of 18 U.S.C. 495, as to which no objection was interposed, was not "plain error" under Rule 52(b), F.R.Crim.P. See *Kitchens* v. *United States*, 272 F. 2d 757, 761 (C.A. 10), certiorari denied, 362 U.S. 942; *Walker* v. *United States*, 342 F. 2d 22, 24-25 (C.A. 5), certiorari denied, 382 U.S. 859. It is pure speculation to suppose that the jury, despite the simple nature of the case, was confused by consideration of petitioner's possible guilt

of other offenses as to which there was neither evidence nor discussion in the charge.

With regard to Count 1, charging knowing possession of a stolen government check, whatever defects there may have been in the original charge were cured by the supplemental instruction which clearly set forth to the jury the contents of the indictment and the requisite elements of a verdict of guilt. Any confusion initially caused by the reading of the entire statute was thus entirely dispelled before the jury returned its verdict. Any one count will, moreover, support the sentence imposed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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